78-38

No. 77-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL.,

Petitioners,

vs.

LEROY FOUST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The petitioners, International Brotherhood of Electrical Workers; D. F. Jones, District Chairman, in his representative capacity; Leo Wisniski, General Chairman, in his representative capacity; and Frank T. Gladney, International Vice President in his representative capacity (Brotherhood), respectfully request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 6, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 572 F.2d 710, appears in the Appendix hereto at App. 1a. A

Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 24, 1978. No opinion was rendered by the District Court for the District of Wyoming.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Does the judgment of the court below conflict with the decisions of this Court where on the evidence of record the court below affirmed the judgment of the trial court finding that:

1. The Brotherhood violated its duty of fair representation owed to the respondent Foust;
2. Compensatory damages computed on the basis of wages lost because of his discharge were assessable against the Brotherhood, and
3. Exemplary damages were properly assessable.[1]

STATEMENT OF THE CASE

This is an action in which the respondent (Foust), a former employee of the Union Pacific Railway Company (railroad) performing the duties of a Radioman, contended that the Brotherhood, his collective bargaining representative, breached its "contract" with Foust in the handling of a claim against the railroad for his alleged unlawful discharge.[2]

[1] While affirming the trial court's ruling allowing the jury to determine the amount of exemplary damages the court below stated that its mandate would direct the trial court to reconsider the amount of such damages it had approved, because in the judgment of the court below the amount assessed "seems high". (App. 19a).

[2] The trial court just prior to the issuance of instructions to the jury accepted the Brotherhood's contention that the action was properly classed as a case involving an alleged breach of the duty of fair representation owed by a collective bargaining representative.

Foust was injured on March 9, 1970 while working on his railroad job, and thereafter and throughout the entire period material to this action, was physically disabled from performing the duties of his job.[3] Foust retained legal counsel to handle all of his affairs because of his disability which required medical treatment, hospitalization and periodic surgery.

On February 3, 1971, the railroad notified Foust that his services were being terminated immediately as a result of his failure to comply with the rules requiring employees to request and be granted leaves of absence for medical reasons.[4]

The agreement covering Foust's employment provided a period of 60 days within which Foust or any one he selected to act on his behalf could file a claim with the railroad challenging the validity of his discharge.[5] Fifty-

[3] The Railroad Retirement Board granted Foust a full disability annuity, effective May 2, 1971, the benefits of which he has received since that date. Foust was not gainfully employed at any time material to this cause after incurring his injury.

[4] Rule 23 of the collective bargaining agreement between the railroad and the Brotherhood provides as follows:

> When the requirements of the service will permit, employees on request, will be granted leave of absence for a limited time, with privileges of renewal.
>
> Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of leave of absence.

[5] Rule 21 of the agreement (Rec. Vol. IV, Exh. 10) *inter alia* states "All claims or grievances must be presented in writing . . . by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based".

The Railway Labor Act, 45 U.S.C. 151 *et seq.*, provides that "All disputes between a carrier . . . and its employees shall be considered,

two (52) days after Foust was notified by the railroad of the termination of his services his legal counsel sent a letter to the District Chairman of the Brotherhood requesting his assistance in obtaining reinstatement of Foust in his former job (App. 3a note 1).

A claim on Foust's behalf was prepared and filed with the railroad by the District Chairman within ten days, a date two days after expiration of the 60-day period permitted. The claim was denied by the railroad because of its late filing and its decision was sustained finally by the National Railroad Adjustment Board. Neither the railroad nor the Board undertook an investigation into the merits of Foust's discharge.

The complaint herein was filed on April 19, 1974 seeking compensatory damages for wages "lost" by Foust (back pay) during the period February 3, 1971 (date

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and, if possible, decided, . . . in conference between representatives designated and authorized to confer, respectively, by the carrier . . . and by the employees thereof interested in the dispute." (Section 2 Second, 45 U.S.C. 152, Second).

"Representatives . . . shall be designated by the respective parties . . . ." * * * * "Representatives of employees . . . need not be persons in the employ of the carrier . . . ." (Section 2 Third, 45 U.S.C. 152 Third).

"The disputes between an employee . . . and a carrier . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes. . . ." (Section 3, First (i), 45 U.S.C. 153, First (i)).

"Parties may be heard either in person, by counsel, or by other representatives. . . ." (Section 3, First (j), 45 U.S.C. 153, First (j)).

The individual employee's rights to participate in the processing of his grievances "are statutory rights which he may exercise independently or authorize the union to exercise in his behalf." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 740 n. 39, adhered to on rehearing, 327 U.S. 611 (1946). *Czosek* v. *O'Mara*, 397 U.S. 25, 28 note 1.

of discharge) and September 25, 1973 (the significance of which date is explained *infra*), and punitive damages for "breach of contract" by the Brotherhood.

Prior thereto but subsequent to the date of his discharge, Foust on April 21, 1971 filed a complaint against the railroad seeking damages (1) for the injury he sustained during the course of his employment and (2) for his alleged unlawful discharge. On September 25, 1973, Foust's case against the railroad was settled by an agreement under which Foust received approximately $75,000.[6]

The trial court in this case entered judgment based upon the jury's verdict awarding compensatory damages in the amount of $40,000, computed on the basis of wages and fringe benefits relating to his former job "lost" by Foust during the period February 3, 1971 (date of discharge) to September 25, 1973 (date of his settlement with the railroad), and exemplary damages in the amount of $75,000.

REASONS FOR GRANTING THE WRIT

The decision below raises important questions relating to the proper interpretation and application of principles established under federal labor law descriptive of the duty implied by law upon a collective bargaining repre-

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[6] On the same date, the court dismissed Foust's complaint with prejudice on the basis of the settlement reached. At an earlier date and on August 3, 1972 the court entered an order dismissing Foust's claim of unlawful discharge by the railroad because of the Adjustment Board's final denial of Foust's claim on June 2, 1972. As a condition of the settlement with the railroad, Foust executed a release which *inter alia* stated that since the date of his injury he had been "totally and permanently disabled from ever performing the duties of my employment", and that he specifically waived "any possible right of future employment with the Railroad". On the same date Foust executed a resignation from his railroad employment effective February 3, 1971 (date of his discharge). (Rec. Rro. Exhs. 19 and 2).

sentative to provide fair representation to each member of the bargaining unit.

The decision below conflicts with the decisions of this Court, and with decisions in the Tenth and other Circuit Courts of Appeals establishing the standards to be used in determining whether a collective bargaining representative has breached its duty. It appears to be the first such decision in the Tenth Circuit involving parties whose relationship is governed by the Railway Labor Act.

The decision below conflicts with the decisions of this Court, and with those in the Tenth and other circuits establishing the procedures and standards to be used in the allocation of damages in a fair representation case involving an alleged unlawful discharge.

The decision below conflicts with decisions of this Court and those in the Tenth and other circuits on the assessability of punitive damages against a union representative in a fair representation case.

Review by the Court is required also to assure the maintenance of uniformity in decisions of the courts of appeals in the adjudication of fair representation disputes.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS TO BE USED IN DETERMINING WHETHER A COLLECTIVE BARGAINING REPRESENTATIVE HAS BREACHED ITS DUTY OF FAIR REPRESENTATION OWED TO A MEMBER OF THE BARGAINING UNIT.

In affirming the trial court's judgment that the Brotherhood breached its duty of fair representation the court below purported to endorse the decision in *Vaca* v. *Sipes*, 386 U.S. 171, stating that it established the principle

that a union would violate its duty to a claimant if it ignored his claim or if it processed a meritorious grievance in a perfunctory manner (App. 9a). It found that the instruction given the jury by the trial court adhered to this characterization of the decision in *Vaca*.

The court below in affirming the judgment of the trial court rejected the standards explicitly set forth in the decisions of this Court in *Humphrey* v. *Moore*, 375 U.S. 335, 348, in *Amalgamated Association of Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 299, 301, and in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571.

In *Moore* the Court ruled there is no violation of the duty in the absence of substantial evidence of fraud, deceitful action, or dishonest conduct on the part of the union representative.

In *Lockridge* the Court ruled that to prove a breach there must be proof "of arbitrary or bad-faith conduct on the part of the Union", (*Vaca*), and "substantial evidence of fraud, deceitful action or dishonest conduct," (*Moore*), and "substantial evidence of discrimination which is intentional, severe, and unrelated to legitimate union objectives. A showing of "honest, mistaken conduct" was viewed as not enough.

In *Hines*, the Court explained in referring to *Vaca*, that the union's duty was to represent employees "honestly and in good faith and without invidious discrimination or arbitrary conduct."

The court below ruled that the Brotherhood's "perfunctory" handling of the claim was shown by its indulging in "needless correspondence back and forth and insisting that they have an authorization from the plaintiff with respect to [his] representation by the attorney who was seeking" the assistance of the Brotherhood on behalf

of Foust, as well as the fact that General Chairman "Wisniski became a part of the machinery that was used and this delayed the ultimate filing".[7]

The court below is shown to have refused to heed (although so urged by the Brotherhood) the principles established by the Court's decisions in *Elgin, J. & E. Ry. Co.* v. *Burley*,[8] that the Railway Labor Act gives the claiming employee the right to control the handling of his grievance, and the necessity for the union to be "authorized" to handle a claim. The evidence established that at no time did Foust personally request the Brotherhood to file a grievance on his behalf or inform the Brotherhood that his legal counsel was authorized to handle his discharge claim.

The decisions of the Court from *Steele*[9] through *Hines*[10] describe the nature of the duty owed by a representative to a claiming employee. The decisions establish and reiterate that there must be substantial evidence showing that the conduct of the union was motivated by some "animus". Negligence, bad judgment, ineptitude, and the like, not reflecting a dishonest or hostile purpose, do not constitute a sufficient basis for a finding of a breach of the duty. The jury, and successively the trial and reviewing court, appear to have been erroneously influenced solely by the late filing of the claim. The fact that the Brotherhood failed to timely file the claim "despite the shortness of time"[11], possesses no legal signifi-

[7] The opinion of the court below (App. 3a-6a) in part described the procedure followed by the District Chairman in requesting guidance and instructions with respect to the filing of the claim.

[8] See note 5 *supra* herein, page 4.

[9] 323 U.S. 192, 204.

[10] 424 U.S. 554, 556.

[11] The court below conceded that the time permitted for the Brotherhood to file the claim was "limited" and "short" (App. 10a, 11a) and not the 60-day period provided in the agreement, but an 8-day period allowed by Foust's legal representative.

cance, in the absence of evidence disclosing a dishonest or deceitful purpose.[12]

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ESTABLISHING THE STANDARDS AND PROCEDURES TO BE USED IN THE ALLOCATION OF DAMAGES IN A FAIR REPRESENTATION CASE INVOLVING AN ALLEGED WRONGFUL DISCHARGE.

The court below (App. 7a) found that the jury was instructed that it must ignore the wrongful discharge by the railroad as a source of damage, and that a claim against the Brotherhood for breach of duty of fair rep-

[12] In general, see *DeBoles* v. *Trans World Airlines, Inc.*, 552 F.2d 1005, 1013-1020 (3rd Cir. 1977). The decision below conflicts with the standards applied in the following cases among others in the Circuit courts: *Simberlund* v. *Long Island R.R. Co.*, 421 F.2d 1219, 1225 (2nd Cir. 1970); *Jackson* v. *Trans World Airways*, 457 F.2d 202 (2nd Cir. 1972); *Gainey* v. *Bro. of Ry. Clerks*, 313 F.2d 318, 323 (3rd Cir. 1963); *Bazarte* v. *U.T.U.*, 429 F.2d 868 (3rd Cir. 1970); *Balowski* v. *International Union, et al.*, 372 F.2d 825, 834-835 (6th Cir. 1967); *Dente* v. *Masters, Mates & Pilots Local 90*, 492 F.2d 10 (9th Cir. 1973); and with the following decisions in the Tenth Circuit: *Patterson* v. *Tulsa Local No. 513*, 446 F.2d 205 (1971) *cert. denied* 405 U.S. 976 (1972); *Reid* v. *Int'l. Union, Wtd. A.A.&A. Imp. Wkrs.*, 479 F.2d 517 (1973) *cert. denied*, 414 U.S. 1076; and *Woods* v. *North American Rockwell Corp.*, 480 F.2d 644 (1973). Compare *Beriault* v. *Local 40 ILWU*, 501 F.2d 258 (9th Cir. 1974); and *Sanderson* v. *Ford Motor Co.*, 483 F.2d 102, 110 (5th Cir. 1973).

The court below is shown also to rely on *Ruzicka* v. *General Motors Co.*, 523 F.2d 306 (6th Cir. 1975). Although so urged on rehearing, it appears to have attributed no significance in the fact that the Sixth Circuit on rehearing (unreported) in *Ruzicka* had limited and modified its earlier ruling so as to apply only to fair representation cases where the union representative had exclusive control of the grievance procedures.

resentation was a separate and distinct claim from one contending an alleged wrongful discharge.[13]

The instructions given the jury, as described above, were in accord with the rulings of the Court in *Vaca*, in *Czosek*, and in *Hines*, *supra*. Collectively these cases establish the principle that in an action involving an alleged wrongful discharge and a claimed breach of fair representation, and whether or not the employer and the Union both are parties, the damages properly assessable against the employer are those associated with the alleged unlawful discharge, and those properly chargeable to the union are the "incremental damages", if any, occasioned by the breach of duty by the bargaining representative.

Although so instructed it is clear from the verdict rendered by the jury and affirmed by the courts below that the jury failed to follow such instructions. This error by the jury should have been evident to (and corrected by) the court below because of its finding that (App. 16a-17a) the

> only tangible evidence in the record is for lost wages, which would be based on his [Foust's] continuing to have his old job. Although he testified as to loss of seniority together with insurance and other fringe benefits, there was a lack of evidence as to the reasonable value of these items. He did testify as to loss of $1,000 for medical costs resulting from lost insurance.

[13] The court below also found that (App. 8a):

> Emphasis was placed [by the trial court] on the need for the jury to find, in order for the plaintiff to recover, that the action of the *Union* caused damage to him independent of any action which the Union Pacific may have taken.

The court below also found (App. 14a) that:

> The [trial] court first told the jury that it was to ignore any evidence relating to whether or not the plaintiff was wrongfully discharged from employment by the Union Pacific Railroad Company. The defendant Union and its representatives did not participate in any aspect of that decision and there is no charge in the Complaint involving the Union in regard to whether or not the Plaintiff had or had not observed the rules of the carrier which were stated as a basis for the termination of his employment by the railroad.

The court below (App. 17a including note 2) noted also that the Brotherhood had argued that Foust

> should not have damages based upon his pay at the old job because he would not have been performing it due to his injury. He had a disability which prevented him from performing his job as a radioman.[14] No doubt he was unable to testify as to the wages he would receive had he retained his status and been given another job. The only standard that he had to offer was his pay that he had been receiving. Undoubtedly, his loss of fringe benefits was worth something, but from the record we are not able to say what their worth was. Nor can we say that the jury's conclusion was wrong.

The analysis by the court below of the nature of the evidence of record "supporting" Foust's claim for compensatory damages requires the conclusion that such evidence related solely to wages and fringe benefits applicable to Foust's former employment with the railroad. His wages and benefits were regarded as "lost" because of Foust's "presumed" unlawful discharge by the railroad.[15]

[14] Such was the meager "recognition" by the court below that the jury verdict awarded compensatory damages for wages lost by a claimant who was totally unable to earn them because of his physical disabilities.

The indulgence by the court below that lost wages were assessable against the Brotherhood was clearly erroneous also in the absence of any determination by any tribunal establishing the merits of Foust's discharge. See *Vaca*, 386 U.S. 171, 197-198; *Czosek*, 397 U.S. 25, 29; and *Hines*, 424 U.S. 554, 570.

[15] It would seem unnecessary to reiterate what the Court said in *Vaca* and *Hines* to the point that absent a clear showing of un-

Vaca, *Czosek* (a case strikingly similar to the instant case), and *Hines* clearly establish that damages relating to an alleged wrongful discharge are not properly assessable against the Union charged with a related breach of fair representation.[16]

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lawful discharge there can be no damages assessable against an employer or a union.

The *Vaca Court*, 386 U.S. 171, 196, suggested a variety of procedures that could be followed by a trial court when presented with a fair representation case involving an alleged wrongful discharge as to which there had been no prior determination of its lawfulness, in order to properly adjudicate the rights of all parties. Clearly, the procedures recommended were not pursued by the trial court below.

[16] In *Vaca* (386 U.S. at 196-197) the Court said

> . . . what portion of the employee's damages may be charged to the union: in particular, may an award against a union include, as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. . . . The governing principle then is to apportion liability between the employer and the union according to the damage caused by the fault of each.

In *Czosek* (397 U.S. at p. 29) the Court in part said:

> Assuming a wrongful discharge by the employer independent of any discriminatory conduct of the union and subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and the expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union can not complain if separate actions are brought against it and the employer for the portion of the total damages caused by each.

In *Hines* (424 U.S. at p. 570) the Court said:

> To prevail against either the company or the union petitioners [the employees] must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the union.

It is clear that the "fears" of the petitioning unions in *Czosek* (397 U.S. at page 25) that "if sued alone they may be forced to pay damages for which the employer is wholly or partly responsible . . . ." which this Court said were "groundless", became a reality for the petitioning Brotherhood here by the decision below.

Further, the court's description of the evidence of record on the nature of the damages "suffered" by Foust requires the conclusion that there was no material evidence to show that Foust incurred damages in any amount as a result of the alleged breach of fair representation by the Brotherhood.

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT ON THE ASSESSABILITY OF EXEMPLARY DAMAGES AGAINST A BARGAINING REPRESENTATIVE IN FAIR REPRESENTATION CASES.

The court below affirmed the judgment of the trial court with the exception of the amount of the award of exemplary damages. It directed the trial court on remand to reconsider the amount of such damages awarded in order to determine whether they were excessive. It was the view of the court below that the amount of $75,000 "seems high".

The court below correctly noted that the Brotherhood persistently contended that this was not a proper case for an award of exemplary damages in any amount (App. 17a). The court below also correctly noted that the Brotherhood relied on the Court's decision in *Vaca*, *supra*, 386 U.S. at page 195 which held that under the circumstances of that case neither compensatory nor punitive damages were proper. Such was the contention of the Brotherhood throughout this case.

Expressed in simple terms, compensatory damages are awarded to reimburse a plaintiff for losses sustained.

Exemplary or punitive damages have been found to be assessable as a punishment to deter a wrongdoer from misconduct found to be wanton or reckless or to prevent industrial strife. (*DeBoles, supra* at page 1019).

We have presented our argument that compensatory damages were not properly assessable against the Brotherhood because of its lack of participation in the action causing Foust's discharge and resulting in his claimed "losses" in wages and fringe benefits. That argument spills over into the question of assessing punitive damages against the Brotherhood. Clearly, if the Brotherhood did not participate in any action causing injury to Foust, it should not be assessed damages of any nature. In the absence of such injury at the hands of the Brotherhood, any remedy against it would necessarily be a "punishment" for a harmless lie.

Punitive damages have consistently been rejected by the federal courts under the related statutory provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. *DeBoles, supra* (page 1019), expresses the general policy of the federal labor laws to be to furnish remedies rather than punishments. Inasmuch as the Railway Labor Act was the statute under which the decisions establishing this doctrine arose, the rulings of this Court and the circuit courts in this regard under the LMRA must be deemed to be applicable to fair representation cases arising under the Railway Labor Act.

The decision of the court below on the question of punitive damages is shown also to reject *Vaca* as not being persuasive, as well as to conflict with the decision in the Third Circuit in *DeBoles, supra*, and the decision of the Eighth Circuit in *Butler* v. *Local Union 823, Teamsters*, 514 F.2d 442, 454 (1975).[17] It purports to rely solely

[17] In *Butler* (at page 454), the Eighth Circuit, in part, said in denying punitive damages:

[Footnote continued on page 15]

upon the decision of the Fourth Circuit in *Harrison* v. *United Transportation Union*, 530 F.2d 558 (1975), *cert. denied* 425 U.S. 958.

The Brotherhood believes that the Court will find that facts in *Harrison* are inapposite and its legal reasoning unpersuasive within the context of this case.

The court below expressed the view that "wanton conduct or reckless disregard for the rights of an employee is sufficient to justify a jury's consideration of exemplary damages". We do not believe it necessary to argue this point in consideration of the fact that the record will not support a characterization of the conduct of the Brotherhood in such terms.

The Brotherhood submits that controlling legal precedents demonstrate that permitting the jury to rule on any measure of exemplary damages was error on the part of the trial court which was not corrected by the court below.

Finally, it is submitted that the decision below, if allowed to stand, will impair substantially uniformity in the decisions of the Circuit Courts, and cause an erosion

[17] [Continued]

> The Local's conduct was not the type of outrageous or extraordinary conduct for which extraordinary remedies are needed . . . . Butler [the employee] was not subjected to threats of violence, harassment, physical abuse or the scorn or ridicule of his co-workers, and there was no showing that the Local acted with any malice directed specifically at him.

The decision also conflicts with the rationale of *Williams* v. *Pacific Maritime Assn.*, 421 F.2d 1287, 1289 (9th Cir. 1970) when the court in finding that punitive damages were not properly assessable in a case charging that conspiracy among union officers had caused plaintiff's discharge, stated: ". . . punitive damages cannot be awarded for grievances of this nature under federal labor law". Accord: *Crawford* v. *Pittsburgh-Des Moines Steel Co.*, 386 F.Supp. 290, 294-295 (Wyo. 1974). *See Pearson* v. *Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976).

of fundamental principles inherent in federal labor law policy. It is respectfully submitted that the failure of the court below to apply applicable principles of law established by the decisions of this Court requires that the Court grant certiorari, and justifies summary reversal of the decision below, and the issuance of a mandate directing the trial court to dismiss this cause of action.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the court below.

Respectfully submitted,

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APPENDIX

OPINION OF COURT OF APPEALS
UNITED STATES COURT OF APPEALS
For The Tenth Circuit

(Submitted January 23, 1978 Decided March 6, 1978)

Docket No. 76-1951

LEROY FOUST,
Plaintiff-Appellee

—v—

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, D. C. JONES, District Chairman, in his representative capacity, LEO WISNISKI, General Chairman, in his representative capacity, and FRANK T. GLADNEY, International Vice President, in his representative capacity,
Defendants-Appellants.

Before:

Holloway, Barrett and Doyle, Circuit Judges.

The International Brotherhood of Electrical Workers, defendant-appellant herein, seeks reversal of a judgment of the United States District Court for the District of Wyoming, which was based on a jury verdict holding the Brotherhood liable for breach of duty to fairly represent plaintiff-appellee Leroy Foust in grievance proceedings addressed to the Union Pacific Railroad and ultimately to the Railway Adjustment Board. The judgment of the district court was in favor of Foust and included an award of $40,000 actual damages and $75,000 punitive damages. The crucial question on this appeal is whether the evidence supports the judgment based upon

breach on the part of the Brotherhood of a duty owed to Foust, a member of the Union.

Foust was a radioman, who had been employed by Union Pacific Railroad and had been a member of the International Brotherhood of Electrical Workers, which organization was his collective bargaining representative while he was employed by the railroad. The individual defendants herein are the officers of the Union. The injury to Foust occurred on March 9, 1970, while he was on the job. He had a claim against the railroad under the Federal Employer's Liability Act, which claim was settled on September 25, 1973. The settlement provided for payment of $75,000 to Foust less $2,600 in sickness benefits. He waived future right of employment and any claim that he might have had for alleged wrongful discharge against the railroad.

His second claim was that which had arisen as a result of the railroad company terminating his employment. A release was given with respect to this when he received the $75,000 settlement.

The claim in the instant case is against the Union and is based on its alleged failure to represent him fairly in the proceedings having to do with his grievance which grew out of the termination of his employment by the Union Pacific Railroad Company.

Our main concern is, therefore, whether the proof at trial was legally sufficient to establish a claim that the Union violated a legal duty to represent him, supported by sufficient evidence.

After his injury on March 9, 1970, Foust went on leave of absence from his job in order to obtain medical treatment for his injured back.

The rules in the Collective Bargaining Agreement provided for an employee to file a request for a leave

of absence for a limited period of time with rights of renewal on request. Based upon Rule 23(b) of the Collective Bargaining Agreement, he must apply for leave of absence at the peril of being terminated. The Agreement provides:

> Failure to report for duty at the expiration of leave of absence shall terminate an employe's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of leave of absence.

On January 12, 1971, Union Pacific advised Foust by letter that his current leave of absence had expired December 22, 1970; that they had not heard from him; and that it was necessary that a proper request for an extension accompanied by a statement from his doctor be furnished. On January 21, 1971, Foust's then attorney informed the railroad that Foust had filed a request for extension in December and asked whether it had been received and, if not, what forms were needed.

The railroad responded on January 25, 1971, advising the attorney that it still did not have a physician's statement and that when one was received Foust's request for leave would be considered. However, on February 3, the railroad wrote to Foust and advised him that he was being terminated for failure to request an extension prior to expiration of his leave and for failure to furnish a statement from his doctor as to the necessity for additional leave.

Foust's attorney contacted the railroad in an attempt to get the decision to discharge Foust reversed. On March 26, 51 days after the date of discharge, he wrote to one Dean Jones, District Chairman of the Brotherhood.[1] This letter was received Saturday, March 27.

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[1] Dean Jones was the appropriate officer of the Union for the lodging of the claimed grievance. There was some confusion, which appeared in one paragraph of the letter. This resulted from the

statement that the writer believed that Jones was acting on behalf of the carrier. It was very clear that he was communicating with the Brotherhood and was requested that he act on his behalf. The letter said:

> We have been informed that you are the officer of the carrier authorized to receive grievances under Rule 21 of the agreement between the Union Pacific Railroad and System Federation No. 105, International Brotherhood of Electrical Workers, dated April 1, 1957. If you are not the officer so authorized under Rule 21 would you please, in your official capacity as union representative of Mr. Foust, please inform us by return mail who is the officer of the carrier authorized to receive grievances and also, please forward on to him this written grievance claim which we are submitting pursuant to Rule 21.
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> On February 5, 1971, Mr. L. D. Foust received a letter from Mr. C. O. Jett, a carbon of which was sent to Mr. Leo Wisniski, General Chairman of the I.B.E.W., which terminated Mr. Foust's services with the Union Pacific Railroad. A copy of this letter is attached. It is Mr. Foust's contention that his termination was in clear violation of the agreement between the Union Pacific Railroad and the International Brotherhood of Electrical Workers. Mr. Foust has complied with Rule 25 of said agreement which deals with personal injury. He has filed all papers requested of him by the Union Pacific Railroad. His doctor, Doctor Taylor, has kept the Union Pacific informed as to Mr. Foust's medical progress. Dr. Taylor is a Union Pacific doctor.
>
> Pursuant to Rule 21 Mr. Foust is making this written report of his grievance claim and hereby requesting the International Brotherhood of Electrical Workers to do everything within their power to enable Mr. Foust to be re-enstated as an employee of the Union Pacific Railroad without any loss of wages or loss of seniority. The action of Mr. C. O. Jett was completely arbitrary and capricious, without proper foundation. We will be more than happy to supply you with any and all information we have concerning this incident to assist you in the investigation of this matter.
>
> A carbon of this letter is being sent to Mr. Wisniski and to the President of the International Brotherhood of Electrical Workers to insure that proper notification is given to the union pursuant to Rule 21 and also enter an attempt to help to expedite this matter.
>
> As you are well aware, Mr. Foust filed another claim with you on June 17, 1970 in regards to a union agreement violation that came to his knowledge in late May, 1970. According to Rule 21, paragraph one, all claims not disallowed within 60 days are to be deemed allowed. Mr. Foust to this date has never received any correspondence from you in regards to this claim that he filed on June 17, 1970. You informed him in December by telephone that the union was not going to do anything in regards to his claim due to the fact that he had retained our law firm to assist him in his personal injury claim against the Union Pacific Railroad. For your knowledge and for the knowledge of Mr. Wisniski, who I understand gave you this information to convey to Mr. Foust, Mr. Foust did not retain our firm until late November, 1970, long after the 60 day claim period had expired. We would appreciate some acknowledgment of his claim we are herewith filing and appreciate any and all support the union can give Mr. Foust in regards to this matter. As I indicated to you in our letter of January 21, 1971, Mr. Foust is presently and has always been a strong union man. He looks towards the union for security and backing but is becoming very dishearten [sic] by the unions lack of cooperation.
>
> If I can assist you in anyway or if you require any information from Mr. Foust in regards to this claim, please let me know at your early convenience.

There is little reason for misunderstanding by the Brotherhood as to what was intended here.

Thereupon, Jones contacted the General Chairman of the Systems Council in Omaha, Leo Wisniski. Wisniski prepared a letter which was sent first to Jones in Omaha, and then sent to Foust with Jones' signature. This was dated April 5. It acknowledged receipt of the letter from Foust's lawyer. It explained that Rule 21 of the Collective Bargaining Agreement required a grievance to be presented in writing by or on behalf of the employee involved. The necessity to receive a written authority to handle claims or grievances on behalf of an employee was explained. The letter went on to say that: ". . . Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures . . ."

Jones filed a claim on Foust's behalf, but did not do so before April 6, which was two days after the deadline. The claim letter was prepared by Wisniski in Omaha and was mailed to Jones in Rawlins, Wyoming, and then sent by Jones to the railroad officer in Omaha. It is not surprising that this claim was denied because of its not having been timely filed. The Union appealed this decision, but it was finally denied by the Railway Board of Adjustments as having been filed two days late.

The issues which are advanced on behalf of the International Brotherhood, defendant-appellant, as a basis for reversal include:

1. The alleged error of the trial court in upholding a verdict, the effect of which was to hold the Brotherhood liable for breach of a duty owed to Foust to represent him.

2. The alleged error of the court in failing to set aside the jury verdict granting, first, compensatory damages in the amount of $40,000, and, secondly, punitive damages in the amount of $75,000.

3. The alleged error of the court in allowing the case to be tried by a jury and its having failed to grant a motion for directed verdict.

4. The error of the court in failing to dismiss the case because of the neglect of Foust to pursue and exhaust his administrative remedies.

I.

DID THE TRIAL COURT ERR IN ITS FORMULATION AND SUBMISSION TO THE JURY OR THE STANDARDS WHICH IT DEEMED APPLICABLE?

The court in its charge to the jury explained the plaintiff's theory of recovery as having arisen from his wrongful discharge on February 3, 1971, by the Union Pacific Railroad for having failed to file for a continued leave of absence. The court explained that under Rule 21 of the Collective Bargaining Agreement between the Union and the Union Pacific Railroad Company, a notice of grievance was required to be filed within 60 days of the date that the grievance occurred, the grievance here being the alleged unlawful discharge. Plaintiff's contention was explained as the Union's failure to file the grievance within the 60-day period, notwithstanding his request within the 60-day period and resulting in denial by the Board of Adjustment (which functions under the Railway Labor Act). The court further said that the allegation of plaintiff was that the Union was guilty of gross nonfeasance and hostile discrimination in arbitrarily and capriciously refusing to process the plaintiff's grievance and in refusing to file it timely.

The issues for the jury to determine were, first, whether the defendant Union was obliged to represent the plaintiff at grievance procedures with the Union Pacific; second, whether failure to represent breached a duty owed the plaintiff to represent him fairly in grievance procedures; third, whether the Union was guilty of gross nonfeasance, hostile discrimination and arbitrary and capricious failure to process the grievance and, finally, whether plaintiff was damaged by this failure.

The jury was also told that it must ignore the wrongful discharge by the Union Pacific Company as a source

of damage; that a claim against the Brotherhood for breach of a duty of fair representation was a separate and distinct claim from his wrongful discharge at the hands of Union Pacific.

Emphasis was placed on the need for the jury to find, in order for the plaintiff to recover, that the action of the *Union* caused damage to him independent of any action which the Union Pacific may have taken. The jury was told that the essential legal standard which the evidence had to satisfy was arbitrariness and capriciousness of the Union; that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. Arbitrary and capricious were said to be synonymous and were defined as an act done without adequate principle or an act not done according to reason and judgment. Arbitrary or capricious were defined as requiring judgment on the basis of whether the act complained of is reasonable or unreasonable under the circumstances. Bad faith was described as implying a breach of faith.

It would seem that the source of the Union's obligation to represent the member of the Union arises under the Railway Labor Act, 45 U.S.C. § 151 *et seq*, plus the Collective Bargaining Agreement between the Union and the Union Pacific. Sections (1) and (3) (c) of Rule 21 recognize the right of representatives of organizations to file and prosecute claims and grievances for and on behalf of the employee they represent. From the fact that the Union is exclusive bargaining representative under the Railway Labor Act, and from the recognition further of the union in the Collective Bargining Agreement, the case law as to the duty of the unions to fairly represent the employees has emerged.

The Supreme Court considered the scope of the duty in Vaca v. Sipes, 386 U.S. 171 (1967). There a worker

challenged the union's decision not to appeal his grievance to arbitration. The Supreme Court held that there was no breach of duty by the union in thus exercising its discretion; that it had the right to make an evaluation of the merits of the grievance and to make a decision as to whether its was worthy of an appeal. But, at the same time, the Court fully recognized that the union could have violated its duty to the claimant had it ignored the worker's complaint or if it had processed the grievance in a perfunctory manner.

In giving its charge the trial court adhered to the decision and language of *Vaca*.

The Union seeks recognition of a more narrow standard that was enunciated by the Supreme Court in Amalgamated Ass'n of Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971). The Court in that case spoke of the necessity for showing evidence of fraud, deceitful action or dishonest conduct. *See* 403 U.S. at 299. It also said that there must be evidence of discrimination which is intentional, severe and unrelated to legitimate union objectives. *See* 403 U.S. at 301.

Subsequently, in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), the Supreme Court quoted with approval its prior discussion contained in *Vaca*. In *Hines*, the plaintiffs had been discharged for dishonesty and subsequently discovered evidence that showed they had probably been innocent. The allegation by them was that the union had failed to adequately investigate the charges and had presented no favorable evidence at arbitration. The Court cited *Vaca*, stating that the union cannot ignore a meritorious grievance or process it in a perfunctory manner. It ruled that the allegation contained in *Hines* stated a claim for breach of duty of fair representation, noting, however, that "arbitrary" conduct calls for more than "mere errors in judgment." 424 U.S. at 571.

In Reid v. International U., U.A.W., 479 F.2d 517 (10th Cir. 1973), *cert. denied*, 414 U.S. 1076 (1973), this court cited the language contained in both *Vaca* and *Lockridge*. In Woods v. North American Rockwell Corp., 480 F.2d 644 (10th Cir. 1973), we stated that the duty included an "obligation to avoid arbitrary conduct."

In the case at bar the violation of duty relied upon was the failure of the Union to act within the time provided in the Collective Bargaining Agreement. True, the time available to the Union was limited. This, however, does not excuse their having needless correspondence back and forth and insisting that they have an authorization from the plaintiff with respect to representation by the attorney who is seeking to get them to act.

We are of the opinion that the court's charge to the jury constituted a correct selection of standards and a proper statement of the applicable law as to the duty of fair representation.

II.

WAS THE EVIDENCE LEGALLY SUFFICIENT AND DID IT SUPPORT THE STANDARD?

The grievance was filed out of time, and it was because of this that the Board denied it. In Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975), evidence that the union inexplicably, without making a determination as to its merits, allowed the deadline for taking the case to arbitration to lapse, was sufficient to support a verdict of breach of duty. In Griffin v. International U., U.A.W. 469 F.2d 181 (4th Cir. 1972), the court stated that a union could not refuse to process a grievance without reasons. The First Circuit in De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970), held that the failure to investigate the merits of a grievance could be arbitrary conduct and a breach of duty. In accord is Hughes v. International Bro. of Teamsters, Local 683, 554 F.2d 365 (9th Cir. 1977).

In our opinion the evidence adduced as to the perfunctory manner of handling the claim was sufficient justification for the submission of the issue of breach of duty to the jury. The Union filed the grievance out of time and it was due to this that the Board denied it. The evidence, in addition to that just mentioned, showed that there had been an earlier effort on the part of Foust to file a claim for wages while he was attending physical therapy sessions. The Union apparently believed that this was cognizable under the Federal Employees' Liability Act, but made little effort to clarify the matter. This serves to give character to the subsequent failure of the Union to pursue the claim in question despite the fact that it had full knowledge of the 60-day limit. At no time did Jones or Wisniski seek to contact Foust by telephone. Instead, despite the shortness of time, they insisted that Foust *personally* submit the claim to them. This message was contained in a letter prepared in Omaha, mailed to Rawlins and then mailed to Foust the day after the time for submitting a claim had passed. None of this was necessary. Ordinarily Jones would have been the person to handle a grievance, but Wisniski became a part of the machinery that was used and this delayed the ultimate filing. The jury could consider this as arbitrary, unreasonable and a breach of duty.

III.

DID THE TRIAL COURT ERR IN REFUSING TO DISMISS THE FOUST COMPLAINT BECAUSE OF FAILURE TO EXHAUST INTERNAL UNION REMEDIES?

This contention rests on Article XXVII, Section 12 of the Union's Constitution, which reads:

> Sec. 12. Any member who claims an injustice has been done him by any L.U. [local union] or trial board, or by any Railroad Council, may appeal to the I.V.P. any time within forty-five (45) days after the date of the action complained of. If the appeal is from an action of a railroad local union, or a Railroad Council, it must go to the I.V.P. in charge of railroad matters.

The complaint is that no charge was filed by Foust with the International Vice President of the Union. The Constitution is not before us.

The case of Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973), recognized that exhaustion of intra-union remedies is ordinarily required. There the local had refused to process plaintiff's grievance. The Constitution specifically provided for an expedited appeal and required that this be followed before a member was free to sue the union. We there said:

> The by-passing of the carefully enunciated review measures, absent a clear and positive showing of futility, can only promote disharmony in the field of labor-management relations. 481 F.2d at 184.

The cases hold that a prerequisite to the type of suit which is before us is that there be at least some effort to avail oneself of internal remedies. *See, e.g.*, Harrison v. Chrysler Corp., 558 F.2d 273 (7th Cir. 1977); Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975); Mills v. Long I. R. Co., 515 F.2d 181 (2d Cir. 1975).

The Supreme Court held in Glover v. St. Louis-S.F. Ry. Co., 393 U.S. 324 (1969), that a minority member who claimed racial discrimination was excused from the exhaustion requirement based on futility, where the evidence was insufficient that the internal remedies would prove adequate. *See* Retana v. Apt., Motel, Hotel & El. Op. U.,

453 F.2d 1018 (9th Cir. 1972). The worker there was unable to speak English and had repeatedly sought union help without result. Perhaps this is another way of arriving at the conclusion that it would be futile. There are other cases that hold that a showing of futility or inadequacy or likelihood of bias will excuse failure to exhaust. *See* Calagaz v. Calhoon, 309 F.2d 248, 259-60 (5th Cir. 1962); Patterson v. Bialystoker & Bikur Cholim, Inc., 81 C.C.H. Lab. Cas. ¶ 13,251 (S.D.N.Y. 1977); Cefalo v. International U. of Dist. 50, U.M.W., 311 F. Supp. 946, 953 (D.D.C. 1970).

There is no evidence from which we could conclude that the appeal to the International Vice President in charge of railroad matters would have been availing. Finally, considering that the present suit is for damages and not for reversal of a decision of a union officer and has been tried and appealed, it would be a strange result to now say that it is defective because of failure to first appeal to the Vice President.

Judging from the nature and character of this claim, there seems little likelihood that the Union would have acted in an effort to compensate Foust for the failure. Moreover, the Union did little to bring this question to the attention of the trial court. For these reasons, it does not loom large as a defense to a verdict following a complete trial.

In reaching this conclusion, we are not denying the policy which favors making every effort to obtain a settlement of intra-union disputes.

IV.

DOES THE FACT THAT THE UNION WAS NOT THE SOLE AGENCY FOR PRESENTING GRIEVANCES ALTER THE EXISTENCE OF ITS DUTY?

The Union argues that since Foust had the right under the Railway Labor Act and the Collective Bargaining Agreement to file the grievance himself, this undermines the existence of a duty on the part of the Union to initiate the grievance. However, Conley v. Gibson, 355 U.S. 41, 47 (1957), held that this fact did not excuse the union's racial discrimination in refusing to represent employees. The Supreme Court reasoned that the bargaining power of the union was much greater than that of an individual or a small group.

Some courts have not allowed the union to make the employee's right to assert his own grievance a defense where the employee has committed his grievance to the hands of the union and has relied on the union effort. *See* Harrison v. United Transport U., 530 F.2d 558 (4th Cir.), *cert. denied*, 425 U.S. 958 (1976); Schum v. South Buffalo Ry. Co., 496 F.2d 328 (2d Cir. 1974); Browning v. General Motors Corp., Fisher Body Div., 387 F. Supp. 985 (S.D. Ohio 1974). Having undertaken to act affirmatively on behalf of Foust, the Union is precluded from escaping responsibility by asserting that Foust could or should have presented the grievance rather than depend on it.

V.

DID THE COURT CORRECTLY INSTRUCT THE JURY ON THE QUESTION OF CAUSATION?

The court first told the jury that it was "to ignore any evidence relating to whether or not the plaintiff was wrongfully discharged from employment by the Union

Pacific Railroad Company. The defendant Union and its representatives did not participate in any aspect of that decision and there is no charge in the Complaint involving the Union in regard to whether or not the Plaintiff had or had not observed the rules of the carrier which were stated as a basis for the termination of his employment by the railroad."

There is a dictum in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976), which says that in an action against the employer and the union jointly, wrongful discharge is an ingredient of the action. The case at bar was tried on the theory that wrongful discharge was not a necessary element. The union itself consented to the court's instruction that the wrongful discharge suit and the fair representation action were distinct and separate, one against the railroad and one against the Union. Bearing in mind that this was not an action against both employer and Union, we view the trial court's instruction as to the separateness of the claims to be valid. From a further instruction of the trial court this is very clear:

> You are also instructed that a claim by a former Union member against a Union for breach of its duty of fair representation is a separate and distinct claim which the member has and is apart from any right which the employee may have or may have had against his employer. Thus, if you find from a preponderance of the evidence that the actions of the Union have caused damage to the Plaintiff independent of any actions which the employer may have taken, you may award such damages as the evidence shows the Plaintiff incurred.

The court was saying that in a suit against the employer the essence of it would be wrongful discharge. Here, as to the Union, the court told the jury that

there must have been an injury independent of any action on the part of the employer.

It is conceivable that wrongful discharge could be looked to in a fair representation suit against the Union alone. Where this is true an inference of wrongful discharge could be drawn from the circumstances surrounding the termination and the fact that he was terminated with loss of not only his job but his incidental rights, merely because he failed to specifically apply for an extension of his leave of absence. However, we need not and we do not reach this issue. We consider the trial court's instruction on this to be appropriate considering the manner of trying and defending this cause.

VI.

WAS THE INSTRUCTION ON THE MEASURE OF DAMAGE PROPER?

The claim for compensatory damage was $75,000 for lost wages and benefits from the date of discharge to September 1973, and the court instructed the jury that the measure of damage to be considered included all of the salary and wages, overtime pay, vacation pay, insurance, seniority and fringe benefits which the plaintiff would have received during the period he would have been working for the railroad company. The verdict was $40,000 and it is contended that this was excessive; that conceding that it would be liable for lost wages, etc. if there were proof of such damages, there was not sufficient evidence. There was no objection by the Union to the instruction given on the measure of damage.

About the only tangible evidence in the record is for lost wages, which would be based on his continuing to have his old job. Although he testified as to loss of seniority together with insurance and other fringe bene-

fits, there was a lack of evidence as to the reasonable value of these items. He did testify as to loss of $1,000 for medical costs resulting from lost insurance. It is argued that he should not have damages based upon his pay at the old job because he would not have been performing it due to his injury. He had a disability which prevented him from performing his job as a radioman. No doubt he was unable to testify as to the wages he would receive had he retained his status and been given another job. The only standard that he had to offer was his pay that he had been receiving. Undoubtedly his loss of fringe benefits was worth something, but from the record we are not able to say what their worth was. Nor can we say that the jury's conclusion was wrong.[2]

As to his having settled with the railroad for the injury under F.E.L.A., we do not view this as precluding a recovery for breach of duty of fair representation against another party.

The next point advanced by the Union is that the trial court erred in instructing the jury that they could award punitive damages in order to punish the wrongdoer for some extraordinary misconduct in order to serve as an example to others if they found that the Union had acted "maliciously, or wantonly, or oppressively." This instruction was objected to, the basis being that the cause was not a proper one for exemplary damages.

The Union relies on some language in *Vaca, supra,* 386 U.S. at 195, which says that under the circum-

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[2] The tangible dollars and cents evidence was from the defendant. He said that his wage loss in the period in question exceeded $31,000. He also testified that he spent $1,000 for medical costs in connection with his wife's illness. No expert testimony was given as to the value of the fringe benefits that were the intangible property right of the job. We doubt whether such expert testimony would have added anything. The jury was no doubt convinced that the mentioned values were substantial enough to justify the verdict.

stances of that case neither compensatory nor punitive damages were proper. Dicta in Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir. 1977), indicates that such damages are not recoverable.

In Butler v. Local U. 823, Int. Bro. of Teamsters, ect., 514 F.2d 442 (8th Cir. 1975), the Local's conduct was not regarded as the type "of outrageous or extraordinary conduct for which extraordinary remedies are needed." The opinion continued that it amounted to the commonly encountered policy of favoring one group of members over another. The Eighth Circuit expressed the view that in order to have exemplary damages, there had to be express malice. The *Butler* court also mentioned that the federal courts should fashion remedies under the labor statutes with a view to achieving a goal of industrial peace.

The Fourth Circuit in Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), held that punitive damages were proper where the union was guilty of misleading conduct in the extinguishment of a railroad conductor's right to pursue its grievance. The court said that in a suit against a union for failure to provide fair representation, punitive damages were important in bringing about the objectives of the remedy. The fair representation case was compared to the civil rights action. That court also rejected the necessity for having actual malice in the sense of personal animosity. *Compare also* Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382, 386 (8th Cir. 1977).

We are not convinced that actual animosity or express malice or premediated malice are essential to the award of punitive damages. Wanton conduct or reckless disregard for the rights of the employee should suffice. We approve, therefore, of the submission by the court of the issue of exemplary damages to the jury, and we find no fault in the trial court's instruction.

Nor are we able to say that the amount awarded was excessive. We can, however, say that the sum of $75,000 seems high, and as a result we feel that the trial court should have an opportunity to reconsider the question whether it is excessive and to order a remittitur if on reconsideration it determines that the amount is excessive. This question is better determined by the trial judge who heard the evidence and is more in tune with the facts than is this court.

The judgment of the district court is affirmed with the exception of the award for exemplary damages. As to that, the trial court is directed on remand to reconsider the amount[3] of the exemplary damage award in order to determine whether it is excessive. Should the trial court conclude that it is excessive, that court is authorized to order the amount of the excess to be remitted by the appellee or, in the alternative, the court is authorized to grant a new trial on the question. If it determines that it is not excessive, it shall allow it to stand.

It is so ordered.

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[3] As to the authority of the appellate court so to act, *see, e.g.*, Du Breuil v. Stevenson, 369 F.2d 690 (5th Cir. 1966); Matanuska Valley Lines, Inc. v. Neal, 255 F.2d 632 (9th Cir. 1957).

RAILWAY LABOR ACT

45 U.S.C.

45 U.S.C. 151 *et seq.*

45 U.S.C. 152 § 2 Second

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers by the employees thereof interested in the dispute.

45 U.S.C. 152 § 2 Third

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives or employees for the purposes of this chapter need not be persons in the employee of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as as their representatives of those who or which are not employees of the carrier.

45 U.S.C. 153 § 3 First(i)

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or

working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition to the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. 153 § 3 First(j)

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.